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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-538

MAMMOTH BULK CARRIERS, LTD.,
Petitioner,

vs.

JAMES D. BACHTEL, DONNA BACHTEL,
and TWIN HARBOR STEVEDORING CO.,
Respondents.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION

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ARGUMENT

I. THE PROCEDURAL DEFECTS URGED BY RESPONDENTS DO NOT AFFECT REVIEW OF THE OSHA REGULATIONS ISSUE.

A. Rule 28 did not deprive the Court of Appeals of the power to hear the OSHA regulations issue, and this Court may therefore review that issue without considering any questions about Rule 28.

There is no obstacle to review of the OSHA regulations issue, no matter how the Court might view the Rule 50(b) question. Respondents seek to foreclose consideration of the OSHA regulations issue by arguing that Petitioner failed to brief the matter adequately in the Court of Appeals under Rule 28, Fed.R.App.P. But Rule 28 is not

jurisdictional. Respondents cannot even argue that the Court of Appeals erred in deciding to consider the substance of the OSHA issue; the most Respondents can point to is a warning from another court of appeals that issues not adequately presented "ordinarily" will not be considered.

Here the Court of Appeals did reach the OSHA issue and ponderously decided, contrary to all the decisions in other circuits, that the stevedore company's breach of OSHA regulations, which apply by their own terms only to stevedore companies, may be used as evidence of a shipowner's negligence. There is nothing which prevents or complicates review of that decision in this Court.

B. Respondents do not argue that Petitioner failed to object to Instruction No. 14.

The Court should not be misled by the apparent suggestion at page 4 of the Response that Petitioner failed to object to the OSHA jury instruction, No. 14. At page 11 of the Response Respondents acknowledge, "Petitioner excepted to the court's Instruction No. 14 . . . ."

II. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER AVOIDED A WAIVER OF ITS EARLIER MOTION FOR A DIRECTED VERDICT.

Respondent argues that this Court cannot review the scope of the shipowner's duty because the shipowner, which made a motion for directed verdict after the close of the plaintiff's case (Reporter's Transcript pp. 333-34), waived the motion by failing to renew it at the close of all the

evidence. The Court of Appeals held that petitioner's request for a jury instruction requiring a verdict in its favor adequately brought the issue of the sufficiency of the evidence to the trial court's attention and prevented waiver of the prior motion. 605 F.2d at 441-42, pp. A-6 and A-7 of the Petition. There was also a colloquy after the close of all the evidence among counsel and the court on the sufficiency of the evidence (Reporter's Transcript pp. 538-39). The Court of Appeals was undoubtedly correct that these facts might preclude a waiver of the earlier motion. *Pittsburg-Des Moines Steel Co. v. Brookhaven Manor Water Co.*, 532 F.2d 572 (7th Cir. 1976); *Bayamon Thom McAn, Inc. v. Miranda*, 409 F.2d 968 (1st Cir. 1969); *Jack Cole Co. v. Hudson*, 409 F.2d 188 (5th Cir. 1969). Even in *Lowenstein v. Pepsi-Cola Bottling Co.*, 536 F.2d 9 (3d Cir. 1976), where the court found counsel's conduct did not avoid waiver, it indicated that conduct similar to that at issue here might have done so. 536 F.2d at 11-12.

The cases cited by Respondent are not contrary to the decision below. In *Martinez Moll v. Levitt & Sons*, 583 F.2d 565 (1st Cir. 1978), the sufficiency of the evidence was not questioned in the directed verdict motion, and renewal of that motion, therefore, could not preserve the issue. 583 F.2d at 568. In *DeMarines v. K.L.M. Royal Dutch Airlines*, 580 F.2d 1193 (3d Cir. 1978), the directed verdict motion at the close of plaintiff's case had raised the issue, but counsel's informal effort to renew the motion never reached the judge. 580 F.2d at 1195-96, n.4.

The decision below merely holds that the facts show no waiver of the directed verdict motion, and that is a deci-

sion which does not call for review in this Court, particularly in a case which does present admittedly substantial other issues. Respondents seek to prevent needed review of the substantive issues by portraying the lower court's procedural decision as one raising questions of law on which the circuits are divided. Since the circuits are not divided on the law and since Respondents are unwilling even to suggest that the Rule 50(b) question deserves plenary review, the Court should not deny certiorari on the procedural ground alone. To do so would have the same result as summary reversal of the Ninth Circuit's decision on the Rule 50(b) question and permit Respondents to prevail on the very issue they are not urging be dealt with by the Court.

CONCLUSION

As the Response acknowledges, this case raises two substantial issues regarding the shipowner's duty under the Longshoremen's and Harbor Worker's Compensation Act, and review ought not to be thwarted by the spectre of jurisdictional defects or an array of issues. Though the grant might be limited to the OSHA regulations question, the Petition for a Writ of Certiorari ought to be granted.

Respectfully submitted,
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